THIRD EDITION

MEDIATION
Theory & Practice

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Mediation Theory and Practice

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PREFACE

Since the first printing of *Mediation Theory and Practice* more than a decade ago, the field of mediation has found increased institutional stability and legitimacy in a variety of contexts in which it was once viewed as outside the mainstream. Mediation practice has fulfilled those early predictions of growth and acceptance, and it continues to shape the traditional conflict resolution landscape in new and exciting ways. The 3rd edition of *Mediation Theory and Practice* is revised and updated to reflect those changes in the alternative dispute resolution field, with expanded content on the role of evaluative mediation and careers in conflict management.

Our goal continues to be providing entry-level students and practitioners a blend of mediation theory and skill-focused applications. Case studies reflecting the expanding practice of mediation as well as the influence of current research have been added. We maintain the central focus of introducing students to the basics of mediation in an accessible way through narratives and examples. This text aims to address the core concepts necessary for the Introduction to Mediation class and the Basic 40-Hour Mediation Training. We continue to challenge students to work toward practical application and lifelong improvement. Each chapter contains discussion questions, case analyses, and examples to encourage students to explore the intricacies of the material and to elicit insights about the mediation process.

Chapter 1 explains how people find their way to mediation. By comparing mediation to other forms of dispute resolution, the reader can discern the primary benefits and disadvantages of choosing to resolve issues through mediation. This first chapter introduces the interest-based philosophy of conflict management.

Chapter 2 distinguishes between various approaches to mediation, including evaluative and conciliation. We introduce balanced mediation as the training model in this book. We explore variables that make a difference in how a mediation session unfolds.

Chapter 3 begins instruction in the competencies required for beginning mediators. We focus on listening and strategically asking questions as the building blocks of a mediator's skill base. A variety of tactics are presented to aid mediators in validating and moving parties through the mediation process.

Chapter 4 details premediation activities and the work of case managers or intake coordinators. Getting parties to the mediation table requires skills in education, information gathering, and assessment.

Chapter 5 overviews the mediator's preparation for a session and ethical considerations. Specifically, the chapter addresses mediator roles and the concepts of neutrality and impartiality. Additionally, Chapter 5 shows how to create a mediation plan based on analysis of the type of conflict being exhibited and information gathered during intake.

Chapters 6 through 10 explore the phases of a mediation session and the skills required in each phase, with one chapter dedicated to each major phase. Chapter 6 outlines the mediator's opening statement (mediator monologue). We provide a sample opening statement and a discussion of each function of the mediator's monologue.

Chapter 7 presents skills for storytelling and issue identification. Symbolic interaction, attribution theory, and emotional intelligence are introduced as informative about disputants' perspectives during storytelling. We identify specific mediator strategies and pitfalls beginners should avoid.

Chapter 8 lays out how to create and frame the negotiation agenda, featuring tools such as the two-way commonality statement and the general commonality statement. Readers will examine how best to formulate and communicate the agenda and learn how framing the agenda in neutral terms enhances the process.

Chapter 9 delves into tactics and strategies of negotiation. Mediated agreements arise from the parties rather than from mediator suggestions. This chapter provides the beginning mediator techniques for fostering cooperative efforts as well as techniques for traditional, competitive negotiators. We discuss strategies such as fractionating apparent differences, creating contingency agreements, and using the caucus to respond to difficulties.

Chapter 10 is a guide to writing a Memorandum of Understanding and to closing sessions. We explain the skill of agreement writing, with the primary goal being able to make the disputants' agreements clear, durable, concrete, behavioral, and based in reality.

Chapter 11 explores the ever-expanding world of the mediator. A review of a variety of mediation contexts and applications is presented, as are different models of mediation, such as the panel model, co-mediation, and Internet mediation. We discuss volunteer and professional mediation opportunities for service or employment and the use of conflict management skills in other professions.

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1 INTRODUCTION TO MEDIATION

WHY MEDIATION?

Welcome to the world of mediation! You are about to study an activity that spans many cultures and thousands of years. Mediation, one form of **alternative dispute resolution (ADR)**, is a process in which a **third party** helps others manage their conflict—a worthwhile activity in itself. However, mediation is more than just another alternative to the court system or an offshoot of community problem solving. For many practitioners, mediation is a philosophy for life, or, as Mahatma Gandhi stated, "Peace of mind is not the absence of conflict, but the ability to cope with it." Mediators help frame conflict into something workable, making peace possible.

Individuals trained as mediators find that the skills they learn are applicable to daily communication in their personal and professional lives. People from all walks of life have become mediators—attorneys, counselors, teachers, police officers, human resource professionals, volunteers, college students, and even young children. Some who are trained have found a calling in mediation—an outlet for their lifelong goal of service. Others use mediation in their career path or integrate the skills into their existing careers. Some even consider mediation to be an art form.

What is it about mediation that appeals to so many different kinds of people and is useful in so many different contexts? Mediation is about empowering people to make their own informed choices rather than having a third party (such as a judge) make a decision for them. Mediation is grounded in the belief that conflict offers an opportunity to build stronger individuals, more satisfying relationships, and better communities. As a student of mediation, you will learn the philosophies and **theories** that underlie mediation as well as foundational skills any mediator must possess (discussed in depth in Chapter 11).

We live in a society replete with conflict and one that is very litigious. Every day we hear stories about someone being sued for serving coffee that was too hot, saying nasty things on social media, or failing to fulfill an agreement. Recently in Texas a woman

texted during a movie and annoyed her date, prompting him to sue her for the price of the movie ticket. Although litigation has a respectable and important place in society, there is no doubt the courts are overburdened and should not be the place where all disagreements are settled. Mediation offers less adversarial, cheaper, and quicker ways to resolve conflict. As we hear strange tales about neighbors who sue each other over where they put their trash on garbage collection day, we wonder, "Why didn't these neighbors just talk it out?" In a nutshell, that is what mediation offers—a chance to "talk it out" in a safe and controlled environment.

Benefits for the Disputants

The situation in Case 1.1 with Dana and the Klimes seems like a simple misunderstanding. However, each party is seeing only a limited picture of reality. In each person's view, the other is acting inappropriately. Dana has legal rights to protection from harassment

CASE 1.1
A NEIGHBORHOOD MISUNDERSTANDING

Dana moved from urban Chicago to a small town to be nearer to her grandmother. Prior to moving, Dana had lived for 27 years in an apartment with her mom in a rather rough urban neighborhood. Dana was raised to "mind your own business" and to not engage the neighbors in conflict. As she put it, "You never know who is living next to you—they could be dangerous!"

Across the street in her new neighborhood lived Tommy and Mary Klimes. The older couple was retired, with a grown son who lived elsewhere in town and an elderly Boston terrier named Button. The couple didn't have a fence, but Button didn't wander too much. Besides, all the neighbors knew Button belonged to the Klimes.

Button didn't like Dana from the first moment they saw each other, and anytime both were outside, Button would bark and run at the new neighbor. Dana felt threatened by the dog. She also was apprehensive about talking to the neighbors directly, so she called the police instead. The police came, stopping first at Dana's house to get her statement and then crossing the street to speak to the Klimes. The Klimes were not given the name of the person who had complained about the dog, but later another neighbor told them that the police had stopped at the "new neighbor lady's" house. Tommy, noticing Dana's car was in her driveway, promptly walked across the street to introduce himself and apologize for the dog. He rang the bell and knocked, but there was no answer.

Several days later, Button barked at Dana again and came into the street as she got into her car. Again, Dana summoned the police. This time, the Klimes were issued a citation. When Dana returned home from work, the Klimes' son was outside of his parents' home and yelled obscenities at her as she walked into her house. Tommy heard the comments, came outside, admonished his son, and then walked across the street to apologize to his neighbor.

However, Dana, feeling threatened, didn't answer the door. Tommy knew she was in there and peeked in the front window to see whether she just hadn't heard the bell. Finally giving up, he went home. A few minutes later, the police arrived for the second time that day. Dana had called reporting that her male neighbor was peeping in her windows.

from her neighbors and their dog. She has the right to involve the police and to press for justice. When this case appeared in court, the judge referred them to the **community mediation** program. The judge wanted to see whether these neighbors could resolve their issues together before assigning time in her already overloaded court calendar. In short, the **parties** in this case were ordered to mediation to work out their dispute, if possible. The judge also believed that the parties' **interests** would be served best in a place where they could explore not only the legal aspects of the case but also the issues surrounding how they experienced the event. In court, only the legal issues would be resolved and a neighborhood could be left in turmoil.

Mediation often is better equipped than a formal court proceeding to explore the relational and emotional issues of a dispute. In addition, research indicates **disputants** in court-related mediation programs have favorable views of the mediation process, and they have settled their cases between 27 and 63 percent of the time without having to go before a judge. Moreover, people complied with their mediated agreements up to 90 percent of the time (Baksi, 2010; Wissler, 2004).

In situations where the individuals will have a continued relationship, such as in the case of the Klimes and Dana, mediation is particularly appropriate. In this case, the parties met one afternoon with a mediator. A very tense session began. The Klimes explained that they were offended by how Dana had treated them; Dana was adamant about the righteousness of her complaints. Through the process of mediation, Dana was able to express her feelings about neighbors and, subsequently, the conversation created a way for the Klimes to understand her actions. The Klimes, who had not had the opportunity in the past to apologize for the dog and for their son's behavior, were allowed to assert their desire for a friendly relationship. The result of this real-world mediation was an offer for Dana to come to the Klimes' house for coffee and to get to know Button, the dog. Dana agreed—but only if she could bring some of her famous chocolate chip cookies to share. With a mediated agreement in hand, the court case was dismissed.

Benefits for the Mediator

Mediation not only has value for society and the disputants, it also benefits the individuals who learn mediation skills. Those who become mediators express feelings of accomplishment when they help others solve thorny problems. Students of mediation claim they see a microcosm of life during fieldwork practice.

Those who study mediation accrue benefits even if they never become professional mediators. The skills useful to mediators are transferable to everyday life. Listening, reframing issues, and problem solving are trademarks of a good mediator and are characteristic of effective leaders. Mediator skills enhance individual competence and can be applied informally at home, at work, or with friends. The final chapter in this book details numerous occupations requiring mediation and conflict management skills.

A VIEW FROM THE FIELD: SMALL CLAIMS COURT MEDIATION

Roger Cockerille, a 4th District Court magistrate judge in Idaho, tells the individuals sitting in his courtroom waiting for a trial that he orders most of the contested small claims cases to mediation for two reasons: It is their last chance to work things out together before a judge makes a decision that may not please either of them, and over 70 percent of the mediations result in a settlement. Of those who settle, over 90 percent follow through and comply with the agreement they negotiated. If the court makes the judgment, people can appeal, which delays getting the settlement that was awarded.

In Idaho, the "winner" in an adjudicated case is responsible to collect on the judgment, which means the plaintiff has to find the defendant and try to garnish wages or collect through some other legal means, which is not easy (in 2016 only 37 percent of adjudicated cases were effectively collected). Many people never see a dime when they "win" in small claims court, but 93 percent of the cases mediated in 2016 *did* see their agreement met.

When people arrive at court, they are prepared for a fight. Then they are sent to mediation. While everybody who goes to mediation doesn't have the same experience, many leave transformed. We held a conversation with graduates of the Boise State University Dispute Resolution Program who served as small claims court mediators. Deanna's comment about being surprised that sometimes money wasn't the **issue** was representative of the group's experiences:

> I had a neighborhood case where the people bought a house in the winter and when summer rolled around the sprinkler system didn't work. They tried to fix it, but couldn't figure out how the previous owners had it rigged and couldn't find the other couple. They ended up bringing the former owner to court because it was the only way to find them.

During the mediation session, the disputants in this case came to an agreement that the former owner would buy all the replacement parts and train the new owner on how to work the sprinkler system—and they would get together to make the repairs. They even made plans to have dinner the next weekend. Deanna concluded, "It feels good when you help."

HOW DO PEOPLE FIND THEIR WAY TO MEDIATION?

There are many paths to mediation. Mediation can be sought by disputants, recommended by a friend or coworker, or mandated by a third party, such as the courts or a work supervisor. Counselors, agency workers, and concerned friends may suggest mediation to help solve problems. Mediation occurs throughout society in many contexts. Families, communities, businesses, courts, governments, and schools are common contexts for mediation, although it is being applied in almost every avenue of life.

Family Mediation

Divorcing parents in many states are required to mediate parenting plans for their children prior to bringing their case to a judge. Research indicates the disputants in divorce cases see the mediator's skills as critical to a successfully negotiated settlement—for example, mediators may empathize with both parties, foster a civil conversation, ask questions to clarify facts, lessen destructive communicative patterns among the couple, and shift the focus to the future rather than the past (Baitar, Buysse, Brondeel, De Mol, & Rober, 2012; Cohen, 2009).

Family mediation takes on many forms and can be referred by a variety of sources. In one example, a family was having difficulty reintegrating their son back into the home after

he had run away. A social worker recommended a mediator to help the family negotiate rules and expectations. In another example, an advocacy agency specializing in resources for the aging regularly refers families to mediation when they are negotiating elder care issues. In yet another case, a minister recommended mediation to members of her congregation who could not amicably work out the details on an estate settlement after the death of their parent.

Community Mediation

One of the early applications of mediation in the United States was in promoting community peace. Police who are called about noisy parties or wayward pets may refer the neighbors to mediation. Neighbors who do not get along well, but would like to, may attend mediation as a way to open lines of communication. On a bigger scale, mediation can address concerns citizens have with police departments, with transportation agencies, or across neighborhoods. In one example, vandalism of an Islamic mosque raised concerns throughout the wider religious community. While the perpetrators of the crime were not found, the mediation of public conversations by leaders of multiple faith traditions helped forge a sense of community and establish a message that violence against one religious group was an act of violence against all. Community mediation programs are available within many cities. Other types of mediation specialists work with faith congregations who are in conflict over management approach, personnel, or doctrinal issues.

Entities identified with the National Association for Community Mediation (NAFCM) typically are nonprofit agencies that train volunteers and serve the public regardless of a person's ability to pay (see nafcm.org). Community mediation centers may offer all types of mediation but often specialize in areas such as disputes among neighbors, disagreements between landlords and tenants, and other situations in which local citizens need assistance. If the center is partnered with a court, it may specialize in small claims, child custody, or divorce. Community mediation centers may be better positioned than any other group of mediators to respond quickly to changing needs in their surrounding areas. For example, some centers work to prevent homelessness (Charkoudian & Bilick, 2015).

Tribal councils were perhaps the original large-group conflict resolution system in the Americas and still engage in mediation today. For example, Navajo peoples may create a forum for hearing concerns and helping members resolve issues that could affect the public good ("Peacemaking Program," 2012). In discussion circles, issues may be brought to tribal elders or community leaders and addressed communally among the troubled participants, family members, workmates, or those affected by the conflict.

The value of finding ways to build dialogue in communities embroiled in conflict cannot be overstated. Indeed, "Mediation and social justice are inextricably linked insofar as each has the ability to contribute to the other" (Diener & Khan, 2016, p. 139). Mediation offers tools for building healthy communication between factions.

Victim–Offender Mediation

Victim–offender mediation (also called victim–offender dialogue and **restorative justice**) holds offenders accountable for their actions and offers a means of bringing closure to victims. Judges may refer juveniles or adults to victim–offender mediation so the affected individuals can tell their stories and negotiate a restitution plan rather than a judge

deciding the sentence for the offender—a procedure that leaves victims out of the process. The models vary and include the use of community reparative boards, sentencing circles, family group conferencing, and other types of reconciliation meetings (Gerkin, 2012). In one case, two teenage boys were responsible for vandalizing a city park. The teens were brought face-to-face with the woman responsible for the placement of one of the defaced monuments, which was commissioned as a memorial to her soldier son who had been killed in action. In the process, the teens learned the effect their actions had on this mom. A meta-analysis of relevant studies found victim–offender mediation reduces recidivism in juveniles (Bradshaw, Roseborough, & Umbreit, 2006). These sessions provide a means to help offenders by "holding them accountable in respectful ways that may develop a sense of shame and heightened empathy" (Choi, Green, & Gilbert, 2011, p. 352). It is important to note that restorative justice does not necessarily reject punitive responses, but it offers a chance for perspective taking and healing as part of the resolution.

School-Based Peer Mediation

Peer mediation is employed in many schools and has been gaining momentum in the wake of recent high-profile incidents of bullying and violence. Although school mediation may not be a panacea for all cases of bullying, it may help prevent some situations from deteriorating. In elementary schools, peer mediators trained in very basic conflict management help resolve playground conflicts on the spot without **escalation**, and they have been shown to reduce early-stage bullying behavior (Vreeman & Carroll, 2007).

Many elementary schools, high schools, and universities have instituted programs in which students are trained to mediate cases involving peers. Public school teachers refer students in conflict to a peer mediation program. Dormitory roommates may be referred to a campus mediation center to talk about competing study habits and social time issues. Students involved in group projects may seek mediation to work through issues about assignments, leadership, or work accountability.

Organizational Mediation

Mediation can be included as part of the standard conflict management processes in an organization. Bosses refer employees who cannot work well together to the human resources department for mediation or, if trained, conduct a mediation intervention themselves (a specialization called **supervisor mediation**). A business threatened with a lawsuit by a dissatisfied customer may suggest mediation rather than going directly to court. When a real estate purchase falls through, the buyer and seller can elect to mediate a fair distribution of the earnest money deposit. Many contracts require mediation of any disagreements between customers and the business provider. Domestic and international commercial mediation is edging out arbitration and litigation as the most frequent means to resolve disputes ("Mediation of Investor-State Conflicts," 2014). As litigation can be costly and time consuming, mediating business disputes provides expediency and closure. Even negotiations with trade unions can be addressed through mediation, and the usefulness of mediation is discussed in the publications of many science-based professions, such as engineering (Howarth, 2012). Some organizations have conflict managers on retainer in case a potentially volatile workplace conflict should

arise. Any type of organization can be affected by perceptions of a lack of support for workers (Wu, Lee, Hu, & Yang, 2014), workplace bullying (Mao, 2013; Oliveira & Scherbaum, 2015), changing demographics (Gundelach, 2014), and economic challenges (James, 2014), all of which can exacerbate tensions and create conditions ripe for mediation.

Government and Court-Annexed Mediation

Some situations involve several stakeholder groups that share a common dilemma. For example, regional planning for urban design and conflicts over roadway construction often have cities turning to mediated public input sessions (Forester, 2013). How to manage the declining population of a particular species of animal on public lands is another issue that has been negotiated using facilitated group processes. The Department of the Interior uses mediation to involve the public in decision-making processes (Ruell, Burkardt, & Clark, 2010). The Department of Agriculture participates in mediation with farmers who have violated environmental rules or have past due loans. Government officials negotiate the creation and enforcement of rules in a process called **negotiated rule-making** (neg-reg), a common method for involving stakeholders in decision making (Pitt, 2017). In some cases, federal regulations require the states to oversee mediation processes, as is the case with special education law where states must provide mediation to aid parents and school districts in resolving disputes (Burke & Goldman, 2015).

Many types of civil and criminal cases are referred to mediation by courts—for example, eviction courts encourage landlords and tenants to create an amicable plan for departure from a rental unit (rather than having the sheriff force an eviction). Foreclosure mediation has emerged as a means of keeping families in their homes (Khader, 2010). State taxation entities and the Internal Revenue Service (IRS) use mediators when negotiating past due taxes (Meyercord, 2010). The **REDRESS ©** program has been adopted by the U.S. Postal Services to mediate Equal Employment Opportunity Commission (EEOC) conflicts. Internationally, mediators meet with cultural and political rivals to negotiate innumerable issues, including matters of war and peace.

In sum, people find their way to mediation because it offers a relatively speedy and efficient way to resolve disputes. Instead of filing a case in the courts or attempting to strong-arm an opponent into compliance, mediation brings the parties together to consider their mutual options. Mediation can be considered an alternative to systems that focus primarily on the rights of individuals and rely on **power** to determine outcomes.

POWER, RIGHTS, AND INTERESTS

Ury, Brett, and Goldberg (1988) proposed that conflict management could be viewed from three perspectives. These perspectives are power, rights, and interests.

Resolving through Power

Power-based approaches to conflict can be summed up with the following adage: "Might makes right." Power is the ability to influence another person. In the scenario earlier in this

chapter, Dana could kick the dog and thus exert her superior physical power to put the dog in his place. However, other affected parties also could exert their power. The couple's son might be stronger than Dana and have a physical power advantage. Conversely, Dana's grandmother might be quite wealthy, giving Dana monetary power to obtain a better attorney than the Klimes could afford. If Mary Klimes was the former prosecuting attorney for the city, her power resources could trump those of Dana's as networking and influence are very potent resources.

The power approach to conflict resolution is widely used. War, violence, and revenge are extreme examples of the power system. The consequences of the use of power may be highly detrimental to relationships (between individuals, businesses, or countries). The reliance on power to "win" can lead to distrust and what Galtung (1969) calls **negative peace**: peace resulting from forced submission rather than from a change of heart. As illustrated in international conflicts, such negative peace rarely lasts long. There is some evidence that people who "lose" in disputes may resort to retaliation, seeking **retributive justice** (Okimota, Wenzel, & Feather. 2012). In Chapter 7 we will discuss how power comes into play during a mediation session and what a mediator can do to "balance" power for the disputants.

Power, however, can be appropriate in some circumstances. As a parent, it may be necessary to use physical power to control a two-year-old running toward a busy street (i.e., grabbing the child and removing her from danger). When there are two employees vying for the same vacation days, a manager may find it necessary to make a unilateral decision—an act of power. However, reliance on power as the sole source for resolving conflicts would create a tumultuous society, one with people of low power being trampled by those with high power. Fortunately, humans have created other alternatives.

Resolving through Rights

The second major approach to conflict resolution is derived from the science of rights, a finely tuned system developed throughout European history and adapted into the U.S. legal system. In this approach, the rights of individuals (as laid forth in the law) are the keys to fair and just resolution to conflict. In the U.S. system of justice, the rights of individuals are outlined in the Constitution, delineated by lawmakers, and interpreted by judges. The legal system offers a highly ritualized process for resolving issues that have legal merit (and for dismissing those that do not). In theory, the legal system provides equal access to justice for everyone. All who appear before a judge are governed by the same rules of evidence and legal criteria regardless of race, creed, or social status. The legal system promises disputants a structured means of resolving their disputes.

However, few would argue that power is not wielded in the halls of justice. Money buys better legal representation. Those who are lacking in resources may find going to court not worth the effort, time, or expense. In one case, a low-income couple divorced and then reconciled a few months later and resumed their married life (without the formality of remarrying). For six years, they lived together, sharing all expenses. They separated again and created a custody agreement without the courts. Five years after their second separation, the ex-wife sued for back child support from the date of the original divorce 11 years earlier. The amount of money in dispute was $17,000. The cost to each party for attorneys was approximately

$8,000. The case was heard over a year later. The ex-husband prevailed, the ex-wife didn't receive any additional support, and $16,000 was paid for attorney fees. Litigation was an expensive way to resolve this dispute for two single parents living under the poverty level.

Some disputes are inappropriate for the courts because they lack legal merit. For example, a courtroom is not the place to settle hurt feelings. When these cases somehow are framed in legal terms and taken to court, relationships may suffer as a result of the adversarial nature of the **rights-based** process. In addition, the **anger**, frustration, and hurt that brought the disputants to court likely would be found not relevant to the findings of legal facts.

Consider the relationship of Dana and the Klimes. In the rights-based system, each would take an adversarial **position** and attempt to convince a judge or jury to rule in her or his favor. While individuals may represent themselves in some courts, more often attorneys speak on behalf of the client, further removing those involved in the conflict from the decision-making process. One side would "win" while the other would "lose," leaving at least one person feeling unsatisfied with the outcome. At worst, the individuals will grow more angry while waiting for their day in court, spend considerable money on attorneys and fees, and still lack a guarantee the judge will make a ruling that satisfies either party. Their future relationship could be marred by the escalation of the scenario to the courts and tainted by mistrust and anger. Possible consequences in Case 1.1 include other neighbors choosing sides and continued unpleasant confrontations.

Resolving through Interests

The third approach to conflict provides a forum for issues that do not require resolution in a legal setting. **Interest-based** resolution was popularized by Fisher and Ury from the Harvard Negotiation Project in their book, *Getting to Yes: Interest-Based Conflict Management* (2011). An interest-based approach encompasses any process that focuses on the underlying needs of the parties and permits their feelings, concerns, and needs to gain a foothold in the negotiations. The interests of the parties may include issues of power or rights but also the less tangible issues of respect, esteem, and feelings. An interest-based process might be the best choice for disputants who have engaged in a power struggle or who have positioned themselves into inescapable corners. In other words, "Those who start negotiation with an unyielding position find compromising or thinking creatively difficult. Changing one's mind is perceived as backing down, creating a loss of face" (McCorkle & Reese, 2018, p. 34). An interest-based mediation process can unlock positions and make more creative thinking possible.

Moore (2014) divides needs into substantive, procedural, and psychological interests. **Substantive interests** relate to tangible or measurable things, such as time, specific goods, behaviors, money, or other resources. Two substantive issues for Dana from the case study are trespassing and the dog running loose. **Procedural interests** arise from stylistic differences about how to communicate with each other, organize tasks, complete work, or structure rules and settlements. The Klimes wanted to meet informally with Dana and talk out the situation. However, Dana felt threatened by their process of trying to meet her, and an informal interaction was not acceptable to her. Dana pursued legal means to resolve the dispute, but the judge had other procedural interests and sent the case to mediation.

Psychological interests underlie all of the emotions and feelings that disputants bring to a session. The confusion the Klimes felt over Dana's behavior, the Klimes' need to be seen as good and nonthreatening neighbors, Dana's feelings of intimidation and her discomfort with the dog, and the desire of all parties to have a peaceful existence are psychological interests. While there are no guarantees that relationships will be improved through interest-based resolution, engaging in a process that explores the motivations of disputants may be less damaging than adversarial approaches.

Kritek in *Negotiating at an Uneven Table* (2002) discusses how interest-based approaches may seem counterintuitive to cultures that rely on "being right" to maintain their power. Humans, however, see the world from many vantage points and have different views of what is "right." Each individual's interests stem from a highly personal perspective on reality.

TABLE 1.1 ■ Three Perspectives on Resolving Disputes

Approach	Benefits	Disadvantages
Power	• Clear winner and loser • Often expedient • Power resources usually easy to identify	• Retaliation may occur • Lack of satisfaction by one party • May lead to violence • Little room for positive expression of concerns • Power is tenuous and may be lost • People with low power resources use what power resources they do have to be heard
Rights	• Clear rules for engagement • Specific requirements for evidence • The law is the same for everyone • People can be represented by attorneys • Process may be open to public scrutiny • Precedents are set	• Emotional issues and interests are not allowed • Usually expensive • Usually very time consuming • Quality of legal representation may affect the outcome • Decisions are made by judges or juries • Laws may prohibit creative solutions
Interests	• Open to exploring feelings • Solutions can be unique to the parties • Not limited to precedence or conventional approaches • Structurally flexible as decision making stays with the parties • May be more expedient than litigation • May be less costly than litigation	• May have little or no public scrutiny • Private justice instead of public, therefore open to bias and malpractice by mediators • Some may not be able to negotiate effectively and may be better served by representation • Lack of consistency in outcome • May deter the establishment of important precedents

Through interest-based negotiations and the assistance of a mediator, each disputant has the opportunity to view the world as others see it.

When the neighborhood misunderstanding case was referred to mediation, an interest-based process ensued. Through the promptings and guidance of a mediator in a safe context, Dana shared her personal background, feelings of distrust, and genuine fear of the dog and strangers. The Klimes were able to have their apology heard, state their views of what it means to be good neighbors, and express their frustration that Dana would not talk to them when the conflict first occurred. Through interest-based negotiations, each party began to see the other as a partner in fixing the problem. The mediator was able to assist the neighbors in resolving the conflict, and they worked out a plan for Dana to choose other alternatives than police involvement when dealing with the dog.

The three approaches to conflict—power, rights, and interests—all have their place in society. While the interest-based approach sometimes is lauded as the ideal choice for resolving all disputes, each of the three approaches offers risks and advantages. No one approach can be considered appropriate for all cases. Table 1.1 presents some advantages and disadvantages of each approach. The needs of the individuals, the issues involved, the power resources of each side, and the concerns for legal precedent should be considered in the determination of the most appropriate approach to conflict management.

The need to explore differences in safe environments while working together toward resolution is underscored by increasing diversity and globalization. In fact, parts of the modern mediation movement were born in communities dealing with inner-city racial and social tensions during the turbulent 1960s. As neighborhoods and businesses become more diverse in ethnicity, gender, nationality, age, and lifestyle, it is imperative to develop channels of communication to manage the predictable clashes of **values**, **style**, and goals that will accompany this diversity.

THE DISPUTE RESOLUTION CONTINUUM

Litigation

Litigation, also referred to as **adjudication**, is the process of resolving disputes through a formal court or justice system. In litigation, disputants (either represented by attorneys or representing themselves) appear before a judge or jury to present their case. The case is evaluated based on legal merit and subjected to analysis via the well-defined science of rights. Litigation is a public forum (given the litigants are of legal age), and each case is weighed against existing precedent, constitutional rights, and interpretation of the law. In a jury trial, the case is presented and a judge instructs the jury of the applicable law(s) and the jury's options in making decisions. The jury returns a decision and the judge rules regarding the outcome. In the United States, disputants have the right to appeal the decision to a higher court and continue to appeal to even higher courts through several levels, finally culminating at the Supreme Court of the United States. The other approaches of dispute resolution discussed in this section are considered alternatives to the adjudicative process.

Arbitration

In arbitration an expert third party knowledgeable about the context of the dispute is empowered to make a decision for the disputing parties. The American Arbitration Association (2017) defines **arbitration** as "the out-of-court resolution of a dispute between parties to a contract, decided by an impartial third party (the arbitrator)." The parties can determine in advance of entering into arbitration which issues will be resolved, the type of outcome, and other procedural aspects. Not unlike the judicial process where the judge and jury hold the decision-making authority, **impartial** arbitrators offer the final solution for the dispute. An **arbitrator** is **neutral** and yet informed enough about the specific issues to conduct investigations and to make an informed decision. Arbitrators typically are experts in their area of practice (such as real estate, labor, contracts, or wages). Arbitration usually is less expensive and more expedient than a trial and typically offers more flexibility in decision making than litigation. Problems may arise from the lack of public disclosure allowed in some arbitration, however.

Binding arbitration is a process in which the decision rendered by the arbitrator is contractual—the parties agree in advance to accept the arbitrator's ruling. If you read the small print on consumer or loan contracts, you may discover that you have agreed to binding arbitration and occasionally the waiver of the right to use other processes.

A situation that led to binding arbitration occurred when a real estate agent met a new client who had pictures of a house she wanted to see. The agent showed her the home. An offer on the house was made and accepted by the seller that day. The problem was that another agent had been working for months with this client, and the pictures of the home came from the original agent. Which agent should get the commission from the sale—the agent who had worked with the client the longest or the new one who closed the deal? The case was brought before a realtors' association arbitration panel. The panel, in a very formal setting, heard from each realtor, asked questions, weighed the evidence, and decided that the agent who first showed the home would receive the commission. Once the panel had made its decision, the parties were required to abide by it. The only recourse was through appeal, and then an appeals board within the association would hear the case.

Forced binding arbitration has become common in commercial contracts. An individual who wants to receive a mortgage, rent a car, lease an apartment, or engage in other business transactions frequently must sign a contract that forces binding arbitration as the only recourse in disputes. In other words, the contract does not allow litigation or mediation, only binding arbitration. There is spirited debate on whether forced binding arbitration gives large corporations too much power and functions to chill dissent from individual consumers (Aschen, 2017).

Another approach is **nonbinding arbitration**. The parties may decide in advance to use the ruling as a suggestion rather than be bound by the arbitrator's decision. In a farming dispute, the pilot of a crop-duster plane inadvertently sprayed the wrong fields and killed a crop worth $500,000. Given the size of this case, the attorneys representing each side engaged in nonbinding arbitration. Hiring a retired judge, they each presented their case and asked him to make an informal decision on the legal merits of the case. This process enabled each

side to weigh the strengths and weaknesses of its case and make a more informed decision about how to proceed. The judge sided with the farmer who lost the crops. The result was an offer of settlement by the crop-dusting company to the farmer. The nonbinding arbitration succeeded in keeping the case out of a lengthy and expensive court hearing.

Med-Arb

Med-arb (mediation-arbitration) is a hybrid process wherein parties come together to mediate their dispute. However, they agree in advance that if they do not reach an agreement, the third party will move into an arbitrator's role and render a decision (either binding or nonbinding). Med-arb is defined as a process in which disputants initially have control of the decision, but they consent to an arbitrated settlement if an agreement is not reached by a preset deadline. In a community resolution program designed to improve relations between the community and the police department, cases are brought to a mediator who represents neither the city nor the community. The mediator may hear a complaint by a citizen alleging a police officer did not follow proper procedure in arresting her juvenile son. In a med-arb situation, the mediator brings in the parties to see whether a joint resolution can be reached. If the parties cannot come to agreement, the mediator then becomes an arbitrator who investigates the case and renders a decision. The right to appeal is part of the process. As with most processes, the quality and type of experience offered to the disputing parties depends on the competence and approach of the mediator. While British Columbia has standards of conduct for med-arb, in the United States it is largely unregulated and has no professional association to give guidance on its standards of practice (Barsky, 2013; British Columbia Arbitration and Mediation Institute, 2017). Figure 1.1 illustrates who decides during arbitration and mediation.

Mediation

For the purpose of this book, we define **mediation** as a process in which a mutually acceptable third party, who is neutral and impartial, facilitates an interest-based communicative process, enabling disputing parties to explore concerns and to create outcomes. In the purest form of interest-based mediation, the following standards will be met:

Mutually acceptable: The mediator must be someone whom both parties agree is appropriate for the mediator role.

FIGURE 1.1 ■ Locus of Control Changes with Method of Resolution

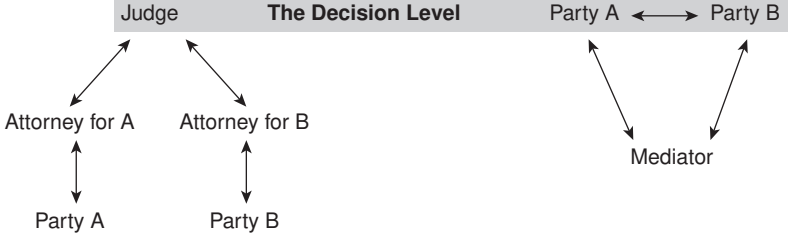
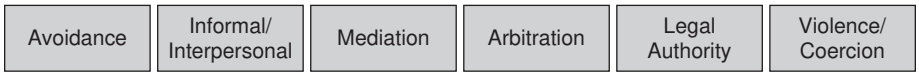


FIGURE 1.2 ■ Dispute Resolution Options



Neutral: The mediator must be someone who is respectful of the interests of both parties but who does not have a preference or affinity for one party over the other.

Impartial: The mediator has no stake in the outcome of the mediation and will not be affected by the decision. The mediator is free from preference toward any possible outcome.

Interest based: The mediator assists disputants in identifying concerns that affect them and in exploring the specific needs that must be addressed in any outcome.

Communicative process: The mediator facilitates the discussion so parties may understand one another, explore ideas in a safe environment, and approach their problem solving as empowered participants. The mediator strategically applies skills to keep the communication process balanced, fair, and productive.

Parties create the outcome: The mediator does not suggest, lead, or persuade parties to select specific outcomes. Ideas for possible solutions arise from the disputants. The mediator helps them examine the workability and appropriateness of their suggestions.

Informal Conflict Management

Individuals may attempt to resolve disputes directly with the other party. The success of these efforts is dependent on many factors, including the skill levels of the parties, the investment in the relationship, the urgency in finding an outcome, and the styles the parties employ to resolve the dispute.

Interpersonal conflict management, individual negotiation strategies, and other personal responses to conflict make up the broad realm of informal conflict management. Informal strategies for conflict management are presented in workshops and classes with titles such as Conflict Management, Negotiation, Interpersonal Conflict, Relational Dynamics, and Dealing with Difficult People. Classes and textbooks devoted to an overview of conflict management theories and practices are widely available (for example, see McCorkle & Reese, 2018). Numerous opportunities are available to broaden skills and knowledge in this fast-growing and ever-evolving field.

A DISCLAIMER ABOUT MEDIATION TRAINING

The saying "a little knowledge is a dangerous thing" applies to mediation. This book presents the basic theory and foundational skills essential for any competent mediator. However, no single publication or training program can provide all of the information, skills, and

practical experience needed to be a competent practitioner. Most states or territories have standards of practice for mediators, and the information in this book covers only one portion of those standards. We encourage readers to explore the standards of practice in their home state or territory and to engage in supervised practice before venturing out as mediators.

SUMMARY

The process of mediation is not new. In fact, many cultures dating back thousands of years have used some form of mediation in maintaining the health of their societies. Mediation offers disputants interest-based opportunities to play an active part in the resolution of conflict instead of relying on a third party to make a decision for them. Other approaches to resolving disputes exist, such as rights-based approaches and power-based approaches. There are benefits and disadvantages to each type of resolution process, and all have an important role in society. People from all walks of life practice mediation, either as a career or as part of another vocation.

Disputants come to mediation from many divergent paths. Some are referred, some are mandated to attend, and some find mediation on their own. All disputants are looking for satisfaction of their needs, which are categorized into substantive, procedural, and psychological interests.

Litigation, or the adjudication process, is a rights-based approach to resolving conflict. Alternative dispute resolution (ADR) offers paths other than litigation. ADR approaches include arbitration (binding and nonbinding), med-arb, mediation, and personal conflict management. Each method differs in where the locus of control lies for decision making.

Most cultural traditions have some type of ADR process for handling conflicts. In the United States, the ADR movement was influenced by the needs of business and government as well as by cultural and religious traditions. Subsequently, there are many different approaches to mediation—leading to much confusion about what mediation entails. This text covers a pure, interest-based mediation approach with roots in the European American traditions of neutrality and impartiality. People who are beginning the study of mediation should be aware of the standards of practice in their state or territory. Becoming a practicing mediator requires much more than just taking a class or reading a book.

CHAPTER RESOURCES

Discussion Questions

1. What issues in Case 1.1 fall outside the scope of the legal system? What would happen to these issues if the neighborhood misunderstanding case were to be settled in court?
2. What are the benefits of resolving disputes with power? What are the possible harms? What might be the consequence of the power approach in the neighborhood misunderstanding case?
3. Why does society require a rights-based approach to resolving legal conflicts? What kind of conflicts would be best served through a rights-based approach? What type of cases would not be served well through a rights-based approach?

4. Cicero wrote, "*Summum ius. Summa iniuria*" (meaning the strictest adherence to law can lead to the greatest injustice). Discuss the concept of justice and how litigation and mediation may further and/or hinder justice.
5. What types of disputes would be inappropriate for interest-based resolution? What are the risks to the parties in this approach? What should individuals consider before engaging in an interest-based negotiation?
6. Each standard or element contained within the definition of *mediation* is necessary to create the mediation process. What would happen to the mediation if one standard was missing or changed? For each of the standards, explain how removing it would change the nature of mediation.

PORTFOLIO ASSIGNMENTS

Portfolio Assignment 1.1: Starting Your Mediator Portfolio

The mediator portfolio contains information, tools, and worksheets. The "Portfolio" assignments will help you build a personal toolkit to use during a mediation session. These materials will be kept in a three-ring binder with removable pages. Bring the mediator portfolio with you each day you attend training or class.

The first task is to secure a three-ring binder and tabs to create sections within the binder. Label the first few tabs as follows: Opening Statement, Forms, Mediation Techniques, Profession Information, and Personal Reflections. Future portfolio assignments will direct you in the content that should be placed in each section.

Portfolio Assignment 1.2: Personal Reflections

Your first portfolio entry is to answer the following questions (to be placed in the Personal Reflections section):

1. What is the value of conflict? What are the risks of poorly managed disputes?
2. What skills do you already possess that may be transferable to being a mediator?
3. How do you see yourself using mediation in your current and future personal and professional lives?

2 THE BASIC COMPONENTS OF MEDIATION

Mediation is a term that covers a wide array of models, strategies, and outcomes. Because the profession of mediation encompasses so much variety, we cannot simply offer a mediation model without first determining the philosophical underpinnings guiding the purpose of mediation. Before we can answer the question "How do we mediate?" we must first establish our reasons for mediating. In this chapter, we discuss assumptions that guide the choices mediators make, compare several models, present the **balanced mediation model** used in this book, and consider how **culture** impacts mediation.

The phases, steps, or processes recommended for specific mediation contexts are organized into what are termed **mediation models.** Different models of mediation are used throughout the world and vary according to their philosophical approach to **conflict management style**, the emphasis given to specific components, and the unique demands of specialized contexts. What mediation models share in common is that once a model is adopted, it becomes a prescription for what will and will not happen during a mediation session. The model sets forth what is essential and what is forbidden.

PHILOSOPHICAL ASSUMPTIONS

Every choice a mediator makes throughout the process alters the course of the mediation. Determining why we mediate provides a direction for those choices. Mediators coalesce around three primary philosophical approaches to mediation: facilitative, transformative, and evaluative. Other philosophies exist, such as narrative mediation grounded in psychotherapy (Winslade & Monk, 2000), but they are not included in this discussion.

Facilitative Approach

Facilitative mediators believe their job is getting disputing parties together and helping them reach their own outcomes. They facilitate and control the conversation between

the parties, allowing the individuals to make decisions without mediator suggestions or interference. Facilitative mediators have varied backgrounds and apply the skills acquired through extensive training in virtually any context.

Facilitative mediators take a **problem-solving approach**, generally assuming that, regardless of the context or the people involved, mediation is about helping people resolve their substantive issues. In this process, mediators *may or may not* delve into the emotional aspects that caused the conflict and *may or may not* help the individuals improve their relationship and communicative habits. A problem-solving mediator usually subscribes to a model with a more orderly and stately movement from one phase of the process to another, culminating in negotiation and settlement of the problem that brought the individuals to mediation.

Small claims mediation programs featuring mediators that are not attorneys typically use a facilitative and problem-solving approach. These cases involve parties who often do not have a long-standing relationship and who may never see each other again. For example, determining restitution for a damaged car fender or settling a disagreement about water rights on adjacent properties might be what brings the parties to court-annexed mediation. The problem-solving approach focuses the mediation on the solutions that will resolve the issues that gave rise to the complaint.

Transformative Approach

The goal of **transformative mediation** is to build healthy relationships, improve communication between parties, create understanding, and promote healthy communities. Bush and Folger published a groundbreaking book in 1994 called *The Promise of Mediation* that captured the spirit of reconciliation in their exploration of transformative mediation.

Bush and Folger believe every choice is biased because of the mediator's worldview and past experience. A major concern for Bush and Folger is the "bias to settle," which they view as a weakness of the problem-solving approach where mediators subtly influence the parties toward settlement. Instead of focusing on the problems to be solved, the transformative mediator should focus on the growth of the individuals.

Transformation mediators assist the parties in discovering their personal values, empower the disputants' inner strengths, and help each person to recognize and empathize with the other party. **Self-determination** (letting the parties make their own decisions) is of paramount consideration (Noce, Bush, & Folger, 2002). Transformative mediators arrive with a mental map and list of questions to help the parties through a journey of self-discovery that may or may not lead to problem resolution. From this perspective, mediators assume that once the parties are transformed, problem solving will follow naturally.

The transformative approach is neither unconcerned with the issues in a conflict nor uninterested in resolution. The hallmark of this approach lies in the mediator's acumen in transforming the conflicting individuals from adversaries to collaborators. The by-product of this approach will be a transformed relationship where the conflict is addressed in light of who the parties are to one another.

CASE 2.1
MY OLD FRIEND IS MY NEW BOSS

Reymundo and Noah work together as supply clerks in the same department at a warehouse distributing company. They graduated from Central High School the same year, but they didn't know each other well at that time. After working at the same firm for the last two years, however, they have become good friends, sometimes getting together after work for a drink.

A few weeks ago, their section manager quit. The company posted the job, which included a substantial raise and further promotion opportunities down the road. Reymundo and Noah both applied for the job. After saying it was a close decision, the company promoted Reymundo. The company said that Reymundo had been taking management classes at the university at night and that gave him the edge over Noah.

On the first day Reymundo became the section manager, Noah arrived at work 20 minutes after the start of shift. The previous manager had always asked Noah to pick up the monthly reports for her on the 10th of each month, so Noah automatically did as was his routine and picked the reports up in the main office across the complex, which made him arrive at his desk later than the official starting time. When Noah arrived at his workstation, the first words out of Reymundo's mouth were, "You're late and I can't overlook it just because we're friends." Noah was stunned and didn't say anything, but he thought to himself, "Wow! My former friend has turned into a tyrant already." Noah spent the rest of the day fuming over how he had been embarrassed in front of the rest of the staff. He also vowed not to pick up the reports as a favor to the supervisor again.

When the afternoon break time arrived, Reymundo thought he should follow up on the lateness issue and find out more about what was going on—maybe he had been a little abrupt that morning. Reymundo asked Noah to step into the break room for a cup of coffee. Refusing, Noah instead left to go outside. As he walked out, Noah replied, "There is no rule I have to spend my break time with my supervisor."

One week has passed. The friendship seems gone, and the work relationship is stressed. The strain between Noah and Reymundo has started to affect others at work. A special project that Reymundo and Noah were working on has ground to a halt. The general manager of the company has sent Reymundo and Noah to mediation.

Evaluative Approach

With the extension of mediation into more and more court-related processes, evaluative mediation began to emerge. In a legal context, such as a settlement conference, the attorney or judge acting as the mediator evaluates the merits of each side's case. The mediator's evaluation is based on legal expertise and is intended to move the disputing parties toward settlement. Because the focus is on legal evaluation, sometimes little, if any, attention is paid to nonlegal aspects of the case, such as creative outcomes, concern for continuing relationships, or the disputants' overarching interests or feelings (see Michigan Judges Guide, 2015; Noce, 2009; Zumeta, 2000).

Comparing the Three Approaches

One way to understand the differences between mediation approaches is to contrast their overarching goals in the context of how much intervention occurs and how much focus is placed on specific outcomes.

Intervention Level[1]

Discussion about whether mediators make suggestions or evaluate the disputants' information often is described as the contrast between facilitative and evaluative mediation styles (Charkoudian, de Ritis, Buck, & Wilson, 2009; Zumeta, 2000). Purely **facilitative mediators** hold to the rule that mediators do not intervene in the outcome. They create a process to aid the disputants in making their own decisions and never make suggestions or evaluate the worth of a disputant's arguments. When professional mediation first emerged, virtually all mediators were facilitative. As other professions turned to mediation (specifically lawyers and judges), another style of mediation emerged. Purely **evaluative mediators** (usually attorneys) provide expert opinions about the issues being contested, often influencing a disputant to change expectations or positions. The contrast between facilitative and evaluative mediation is illustrated in the following example: If a disputant asks, "What do you think the judge will do if this goes to court?" a purely facilitative mediator would say, "That's not for me to say. What do you think the judge will decide when all she has to look at are the legal facts?" On the other hand, an evaluative mediator might say, "In my experience, judges will only look at the factual evidence, and the evidence you have isn't very compelling."

Facilitative mediators sometimes view evaluative mediators as overly influencing the disputants' self-determination. Evaluative mediators, on the other hand, view not sharing expertise with disputants as allowing disputants to make decisions that are not based on fully informed choice. Many attorney mediators argue that evaluative mediation is a cost- and time-saving practice in court-annexed mediation. Mediators generally agree that practitioners should not evaluate a case if they have no expertise in the area under discussion—for example, those who are not attorneys cannot give legal opinions. Evaluative mediation by novice mediators with no professional expertise is highly questionable.

Outcome Focus

Transformative mediators are primarily concerned about the relationship of the parties. The goal of transformative mediation is to change individuals from adversaries into people who see the value of the other disputant and their relationship. Once transformed, the parties have the basis to create long-lasting and meaningful solutions. The transformative mediator thinks a focus on solutions is too limiting.

Conversely, the goal of problem-solving mediation and evaluative mediation is to help the parties work through issues and find a resolution to their problems. The problem-solving approach to mediation generally follows prescribed phases designed to move parties toward agreement. Mediation, from this approach, focuses primarily on substantive issues (e.g., money, distribution of resources, or procedures).

[1] An earlier version of this discussion can be found in McCorkle & Reese, 2018, *Personal Conflict Management,* 2nd ed.

FUNCTIONAL MODELS

Most mediation models are *functional,* meaning they focus on tasks that must be performed (or on results that must be achieved) in a sequential order. At its most basic, a functional mediation model has several steps, with each one requiring unique mediator skills and processes. For example, Domenici and Littlejohn (2001, pp. 63–98) posit a four-step model with subfunctions embedded within each step:

1. Introduction (of parties, words of encouragement, explanation of process, ask questions prior to beginning)
2. Storytelling
3. Problem solving (defining the problem, agenda setting, option generation)
4. Resolution (including closure)

There are innumerable varieties of functional models. Some models are very prescriptive and require that a specific skill be applied at a particular point during the mediation session. For example, a model might require a **caucus** where the mediator speaks with each individual separately. Other models may prohibit the mediator from bringing the parties together in the same room. Models have been created for panels of three or more mediators. Cross-cultural models focus on establishing shared understanding (United States Institute of Peace, 2001). Community mediation programs using volunteers with minimal training sometimes adopt a "trust the model" philosophy that involves lockstep phases proven to be effective with relatively simple cases involving neighbors. The therapeutic family mediation model includes an assessment step to detect families with violence or other issues that could make child custody mediation problematic (Irving & Benjamin, 2002). Juvenile victim–offender models include steps that change depending on the age of the offender. Public school or playground peer mediation models are simplified to fit the sophistication level of child mediators. One early peer mediation model for grades 6 through 12 (Cohen, R., 2005, p. 209) instructs the adult coordinator to select and screen the cases that are then mediated by students using a five-step model similar to Domenici and Littlejohn's (2001):

1. Agree to solve the conflict
2. Explain the conflict
3. Brainstorm possible solutions
4. Choose a solution
5. Do the solution

INTEGRATING PHILOSOPHIES

Antes, Hudson, Jorgensen, and Moen (1999) observe that mediation models claiming to have steps rarely adhere strictly to their rules. Many factors affect the flow of a mediation session. For example, a disputant may balk at the end of negotiation because he or she has unresolved interests that were not discovered earlier. Other anomalies include skipping stages or performing the steps out of sequence, reaching solutions without the aid of the mediator, and mediators affecting the substance of the mediation, not just the process. As Antes et al. contend, "Good things happen even without reaching agreement" (pp. 288–291). A strict step model may prove too rigid for actual practice.

The balanced mediation model in this book has an inherent problem-solving orientation, but one that is strongly influenced by the desire to engage in **reconciliation** strategies when appropriate. We also acknowledge that mediation phases may progress in a nonlinear fashion. To balance the transformative and problem-solving functions, a mediator must be aware of the many choices to be made throughout the course of a mediation and be aware of the possible consequences to the process of each choice.

VARIABLES THAT MAKE A DIFFERENCE IN MEDIATION MODELS

Our analysis of the principles discussed earlier uncovered several variables that—when included or excluded—dramatically alter the flow of the mediated session and the experiences of the disputing parties. The variables and the skills introduced in this chapter will be discussed in later chapters in more depth.

Premediation or No Premediation

Some models depend on the mediator (or someone working on the mediator's behalf) screening the case in advance of the mediation session. The disputants are interviewed during **intake** to discover their issues and gauge the appropriateness of the case for mediation. In other models, premediation or screening is never handled by the mediator, and the mediator starts the session cold, with no knowledge of the issues or the disputants. Premediation is a standard procedure in victim–offender mediation where the comfort and safety of the victim is paramount. Some divorce and family mediators use premediation meetings to ascertain family dynamics and safety issues in high-conflict situations. In the case of Reymundo and Noah, in-depth premediation probably would not be used as the parties can be educated about the process during the opening statement phase. In Case 2.2, the mediator probably would premediate separately with the parents and the school district to determine the relevant issues so the agenda for a meeting with limited time includes the concerns of all parties.

Allow Uninterrupted Disputant First Statements or Control When and How Long Each Person Speaks

Some models (see Beer & Stief, 1997) provide time for disputants to speak without interruption from the other party or the mediator—occasionally with no limits to the

CASE 2.2
WHAT'S BEST FOR ELI?

Jodi is a single mom of two boys ages six and four. She lives in the small town of Ridgeman, population 2,400. Jodi's six-year-old has an emotional and attention deficit disorder, making him highly impulsive and aggressive whenever he is frustrated. Eli has hit and kicked his first grade teacher, Miss Davies, on more than one occasion. Although she was not injured, Miss Davies is worried about the safety of her other 23 students and how Eli's behavior might affect the entire class. Miss Davies is a first-year teacher and feels stress from the extra time spent dealing with Eli's behaviors. Eli's individualized education program states he is to have an aide available at all times, and the school district hired a recent high school graduate to fill that role.

In October, Eli was frustrated by a handwriting assignment and threw a pencil at Miss Davies, missing her and hitting a classmate. Miss Davies sent him to the office for the 10th time that year. The vice principal suspended Eli for five days and called Jodi, Eli's mom, to pick him up. During the five-day suspension, Jodi and the special education team met to determine how best to handle Eli. The school personnel presented Jodi with the solution of bussing Eli to a special school 30 miles away. Confused and overwhelmed, Jodi felt pressured to agree even though she was not happy with this outcome.

Jodi decided to research her legal options. She discovered Eli has a right to a specialist trained to manage emotional disorders and that the school district is required by law to develop a plan to manage Eli's outbursts. Ridgeman Elementary, however, is feeling pressure from other parents not to let Eli back into the classroom. Miss Davies cares about Eli and worries that Eli's return will not be good for anyone involved. As required by law, the state's department of education has provided a mediator who specializes in special education to help the parties work through these issues.

length of time a person may speak! Other models assume the mediator will actively, but constructively, interrupt the disputants to validate emotions, clarify ambiguities, reduce negativity, summarize, focus on the immediate task, or divert attacks on the other party. In the case of Reymundo and Noah, allowing uninterrupted comments at the outset probably would lead to extensive diatribes against each other—behavior not helpful to the goals of mediation. When accusatory comments persist, the mediator may choose to interrupt the negative trend with emotional paraphrases, reframes, or other skills to moderate emotionality. In the more formal setting with Eli's school in Case 2.2, however, allowing Jodi an uninterrupted chance to share her fears might be appropriate and cathartic.

Allow, Require, or Forbid Private Meetings between the Mediator and the Parties

A caucus is required by some models. This is a private meeting during the session between the mediator and each disputant. When time is short, the caucus can be used to speed up negotiation about distributive issues (like money). A few models forbid use of a caucus. Most models present the caucus as an option that the mediator may employ strategically. Even then, how a caucus is conducted varies. Some models require that if a meeting is held with one party, then the mediator must also meet with the second party. Other approaches allow mediators to meet with only one person and then to return to the session. In most models, what is discussed in caucus is considered confidential communication,

although some models may allow the mediator to provide a range of offers to both parties derived from information garnered in caucus. Parties must be apprised of the **confidentiality** parameters of the caucus prior to any disclosure of information.

In the mediation between Reymundo and Noah, the parties were reluctant to talk to each other at the outset. In a private meeting with each disputant, the mediator explored the feelings that were preventing the discussion from moving forward. After discovering they had only had one negative encounter immediately after Reymundo's promotion, the mediator restarted the session with questions to draw out each individual's perspective. In the case with Eli's school, the mediator asked pointed questions to help the district explore its legal obligations in a caucus outside Jodi's presence.

Require an Agenda before Negotiating, Negotiate as You Go, or Slide Back and Forth between Issue Identification and Negotiation

Some mediators establish an agenda of specific issues that will be negotiated, usually after fairly lengthy information giving by the disputants and probing by the mediator. In these models, negotiation of issues is withheld until after the agenda is established, even if one or more of the parties make offers during opening remarks. Other models do not emphasize the establishment of a formal agenda and permit the mediator either to negotiate issues as they arise or to flow from the identification of issues to negotiation without an agenda.

After the **storytelling** phase, the mediator in Case 2.1 deduced that two issues needed to be settled between Reymundo and Noah: (1) How could they communicate more effectively at work? and (2) What specifically could each party do to move their special project to completion? In Case 2.2 involving Eli, a very formal agenda was created because of the complexity of the concerns and the legal issues surrounding the case.

Consider the Parts of the Mediation as Functional Phases or as Chronological Steps

Most models present functional steps that emphasize what the mediator should accomplish during a particular portion or phase of the mediation, with an acknowledgment that the phases are not set in stone. A few models, particularly those intended for use by children or mediators with relatively little training, are extremely prescriptive in the presentation of chronological steps, even to the point of providing a script of what the mediator should say at particular times during the session.

Approaching the mediation process as functional rather than as strict steps allows the mediator leeway in addressing concerns as they arise. For example, it is not unusual during the problem-solving phase for parties to blame each other for the situation. When recrimination occurs during negotiation, the mediator uses **emotional paraphrasing** or other skills to moderate the strong feelings, even though these skills are more common to an earlier phase in which storytelling occurs. In Eli's case, Miss Davies was quiet during the early phases of the process, but as the agreement began to take shape, she wanted to tell Jodi about her love for Eli. Recognizing that the teacher's story was important to the relationship between parent and teacher, the mediator interrupted the agreement-writing process to encourage her reflections (i.e., returned to the storytelling phase).

Focus on the Problem, Focus on the Emotions, or Balance Problems and Emotions

Models differ on what the mediator is expected to do. Some focus exclusively on substantive issues, such as, "How much is the car worth?" or, "What is the amount of the cleaning deposit to be returned, if any?" Transformative models focus mostly on psychological or emotional causes of conflict, such as, "How did you feel when Reymundo's first words as a supervisor were criticism of you?" or, "What concerns you as a parent about Eli riding the bus?"

In Case 2.1, because Reymundo and Noah have a friendship and an ongoing work relationship, both emotions and substantive issues arise in their case. If the mediator focused only on the substantive issue of the project, a large portion of the underlying problem would continue to fester. If the mediator focused only on the friendship, opportunities to improve workplace efforts might be missed. Likewise, in Case 2.2, because Eli will be a student in the Ridgeman School District for several years, building trust between parent and school is wiser than just focusing on the substantive legal facts.

Prescribe Automatic First Moves within Phases or Allow Mediator Choice

A few models contain specific opening moves within particular phases. For example, a model might prescribe that one must **brainstorm** (a problem-solving technique that will be discussed in Chapter 9) at the beginning of the negotiation phase. Most models prefer that the mediator select an opening move to fit the unique circumstance of each situation. In the case of Reymundo and Noah, the mediator chose to start the problem-solving phase with a question directed to both parties: "What ideas do either of you have to improve your work communication that would be good for both of you and the company?" In Eli's case, the mediator started by asking Jodi what strategies she uses at home to manage Eli's angry outbursts.

Allowing or Prohibiting Parties to Speak to Each Other

Even when the parties are in the same room, a few models do not allow them to speak directly to each other. In other contexts where extreme power imbalances exist, a history of violence is present, or other safety issues arise, mediators may place disputants in different rooms and shuttle back and forth between them or conduct the session by phone or computer. However, most mediation models prefer face-to-face contact.

In the cases in this chapter, it makes sense to let the parties who will have a continuing relationship talk to each other and to keep them in the same room. However, because emotions are high in each of these cases, the mediator may request that the parties only talk to her during the early stages of the session and only allow them to converse directly when emotions are calmer.

Writing and Signing or Not Signing Agreements

Agreement formats vary widely depending on the purpose of the mediation. Some agreements must follow specific formats initiated by a company, regulatory agency, court, or program. Other agreements are for the disputants' eyes only. In some states that have

adopted the standards in the **Uniform Mediation Act**, written agreements are required or strongly encouraged. Agreements will be discussed in Chapter 10.

In the case of Reymundo and Noah, the mediator recorded the points of agreement, each party signed the agreement before closing the session, and the mediator made copies for each individual. In Eli's school case, the state agency required a written and signed agreement, if one was reached. In workplace and other contexts of mediation, the parties will want to know prior to the session whether the agreement will be private between the two of them, if it will be placed in their personnel files, or if it will be open to other forms of public disclosure.

PHASES IN THE BALANCED MEDIATION MODEL

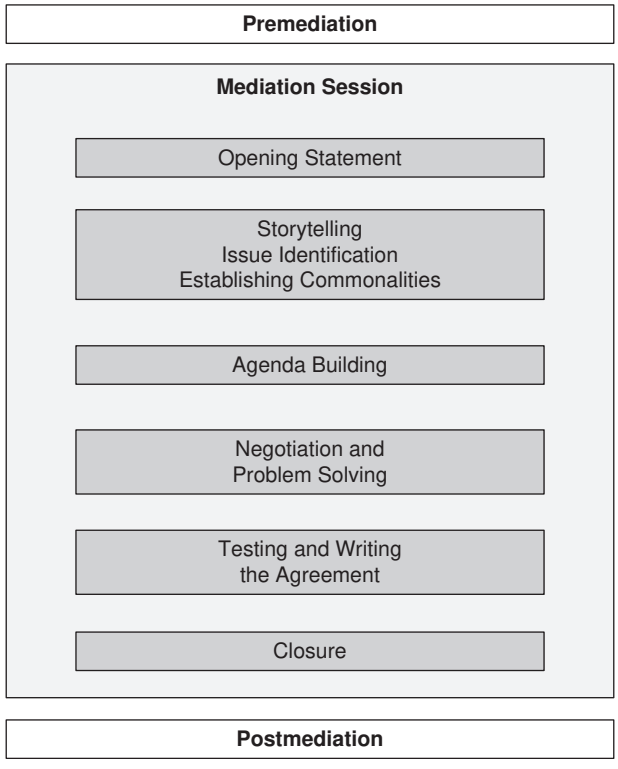
This book presents the balanced mediation model as a useful approach for beginning mediators. The balanced mediation model contains functional phases that were selected to cover the necessary components and skills essential to entry-level mediation or for skill enhancement of practicing mediators. As the mediator enters a specific arena of mediation (victim–offender, community, business, environment, child custody, and so on), the model of mediation practiced in that field may vary considerably from the balanced model presented in this book. However, the balanced model introduces the primary concepts and skills essential to most models of mediation. Chapters 3 and 11 discuss mediator competencies in more detail. After you become competent at the balanced mediation model, you may then choose to join a community of mediators (facilitative, transformative, or evaluative) if that suits your disposition and professional needs. However, some research suggests that many of those who label themselves as an adherent of one of the mediation styles may not be completely faithful to that style (Charkoudian, de Ritis, Buck, & Wilson, 2009; Morris, 2015).

The balanced mediation model (Figure 2.1) is organized around several phases. We assume, however, that the phases are fluid and that the mediator will return in a cyclical fashion to previous phases as new information, issues, or emotional barriers emerge. In addition, the model offers a balanced approach, focusing on both the relational dynamics of the parties and the content aspects of the issues. The balanced mediation model teaches a variety of skills and options so the mediator can adapt to the unfolding needs of each specific case. This chapter outlines the phases of the balanced mediation model. Each phase will be discussed in depth in later chapters.

Premediation

Premediation includes all activities that occur before the mediation session begins. Contact with the parties usually is desirable and often is necessary to persuade one or both parties that mediation is a good option for resolving their disagreement. While not all contexts of mediation allow for premediation, mediators should be knowledgeable of, and competent in, premediation activities should the need arise.

FIGURE 2.1 ■ Phases in the Balanced Mediation Model



Premediation serves three general purposes. First, if one party has contacted the mediator unilaterally, the mediator must approach the other person to determine her or his willingness to mediate. Second, premediation is a time to discover who is involved and should come to the mediation session, develop a preliminary sense of the issues, and determine the presence of power imbalances or other unique personal dynamics. Third, during premediation the mediator has an opportunity to educate the parties about the process and to begin building trustworthiness and credibility.

Premediation is discussed further in Chapter 4. Activities during premediation may include:

- Establishing initial contact with one or both parties
- Determining information about the parties and the conflict
- Gathering documents about the conflict
- Creating a case file

- Distributing mediation forms and documents
- Screening for appropriateness of issues in comparison with the mediator's skill
- Selecting an appropriate time and place for the session
- Assigning "homework" to the parties to prepare for the session
- Building trust in the mediator and the mediation process

Mediation Session

During the session, the mediator leads the disputants through a series of phases. It is important to note that not every mediation requires all items. The phases are sequential in the sense that most of the functions of one phase must be accomplished to make success in the next phase more likely. However, it is incorrect to think of the phases as a linear, one-way, lockstep procedure. Mediators often move back and forth across phases as each unique case requires. This chapter highlights the functions that occur in each phase, with later chapters delving more deeply into the details.

Mediator Opening Statement

The opening of a session is the time when the mediator presents information and establishes a desired tone. The **opening statement**, sometimes called the **mediator monologue**, fulfills several functions. The opening statement functions to:

- Welcome the parties to the mediation
- Introduce the mediator to the parties and the parties to each other
- Provide information about the mediator's credibility
- Confirm that the right people are at the mediation table
- Explain the nature and scope of mediation
- Detail the mediator's role
- Disclose that there might be private meetings (caucuses) with each party
- Define neutrality and impartiality
- Define confidentiality and its limitations
- Reveal the purpose of the mediator's notes
- Establish rules for communication
- State the session length and other logistics
- Establish the role of outside resources or experts
- Secure a commitment to begin
- Transition to the storytelling and issue identification phase

The mediator chooses which functions from the list apply to each specific mediation context. The mediator's opening statement and associated skills are presented in Chapter 6.

Storytelling and Issue Identification

The name of this phase, storytelling and issue identification, is descriptive of the two functions that occur simultaneously once the disputants begin to speak. The mediator encourages disputants to divulge their perspectives. As disputants talk about what brought them to the point of needing third-party assistance, the mediator inserts a series of skills (discussed in Chapters 3 and 7) to reduce any emotional barriers to settlement. At the same time, the mediator listens to the stories for the relevant facts concerning the disputants' past relationship and the problems at hand, deducing from the facts a list of the issues to be negotiated. The mediator then can create a plan based on the type of issues that stand between the disputants and settlement and strategize how to proceed during the agenda and negotiation phases.

In Case 2.1, Noah began by saying, "I couldn't believe it when on his first day as a supervisor, Reymundo became a management tyrant." This statement is informative to the mediator in several ways. First, the tone of the phrasing might suggest Noah is emotional about the situation, leading the mediator to think of ways to bring the feeling part of the story to the table. Second, Noah is pointing to the issue of respect or friendship as being very important to him. The mediator would note this relational issue to explore later. If, however, both parties were disinterested in a future relationship, the mediator would skip over relationship-building elements and focus more on the substantive issues. For example, in a landlord/tenant case, the parties may have no continuing relationship and will never see each other after an issue about the cleaning deposit is settled. In general practice, mediators often face a dual need to explore substantive and relationship issues, taking their cues from the parties on what is important to them.

As the disputants tell their stories, the mediator also listens for what the two individuals have in common. At strategic points the mediator will reveal these commonalities to the disputants in an attempt to stimulate a mutual bond or a motivation to resolve the problem together. In the case of Reymundo and Noah, each claimed that he wanted to be effective at work and treat the other person fairly. Their recognition of this **commonality** of purpose allowed the mediator to bring the two employees to a place where they could problem solve around the issue of effective workplace communication.

Mediators also work to enable the disputants to hear each other's concerns and to create a level of understanding even though they may still disagree about the facts. By focusing on the interests of the disputants (their underlying needs), mediators help them gain perspective from the other's point of view. People experiencing conflict often are so caught up in their emotions that they stop listening and literally cannot understand the other party's feelings or be open to a different point of view. A mediator works to frame one person's story into words that are less threatening and, thereby, easier to listen to (but is always cautious to avoid appearing to take sides). Chapter 7 details skills and mediator choices during storytelling, issue identification, and establishment of commonalities.

Agenda Building

In the balanced mediation model, we highlight setting an **agenda** as a separate phase. Experienced mediators may be successful intermixing storytelling and issue identification with negotiation activities. Novice mediators need to learn to distinguish between the skills of fact finding and the skills of negotiation, as well as mastering how to set an agenda. The mediator's frame for the agenda links the two disputants together in searching for an outcome that is acceptable to each party and often itemizes specific issues that the disputants want settled. The principles and skills used to establish an agenda are presented in Chapter 8.

Negotiating and Problem Solving

During the negotiation and problem-solving phase, the mediator determines an order in which to address the issues, whether to treat each issue separately or combine them, and other strategic options. Communication techniques are applied to assist the parties in:

- Generating options for settlement
- Assessing options for settlement
- Making, modifying, rejecting, or accepting offers

The negotiation phase is a good example of how mediation steps are not linear. A return to storytelling and fact elaboration may be prudent if disputants reveal new information about the situation or hidden issues emerge. The tactical choices and skills necessary to assist disputants during negotiation are detailed in Chapter 9.

Testing and Writing Settlement Agreements

Once a tentative agreement is reached on each of the issues on the agenda, the mediator leads the disputants in a revision of each point in the agreement, testing for specificity and workability. Because this book presents the theory and skills of basic mediation, settlement writing is highlighted with its own phase. Poorly written mediation agreements that disputants interpret differently can cause more damage than good. For example, if roommates agree to "respect each other's time for studying," but they do not determine what *respect* means for each of them, the agreement is open to interpretation. If Sarah wants to have a party on Friday night, Elli can say, "That isn't very respectful!" But Sarah could argue that having it on Friday instead of Sunday is very respectful. Only when the agreement is clear, unambiguous, and understood by both parties in the same way should an agreement be solidified. If the disputants do not reach agreement, the mediator will move to closure without a settlement or schedule additional sessions.

A key point in the balanced approach, however, is that writing agreements is not the goal of mediation, nor is it a measure of the mediator's success. Knowing how to assist in agreeing to disagree or closing a session without an agreement is as important as agreement writing. Seasoned mediators recognize that not all mediations end in settlement, and lack of

settlement does not indicate a failed mediation. Chapter 10 presents the skills of agreement writing and closure.

Closure

Once the agreement is signed, the disputants reach an insurmountable deadlock, or the session must end for some other reason, the mediator moves to closure. In sessions ending in agreement, the mediator will praise the disputants for their work, acquire signatures on the agreement form, make all parties a copy of the written agreement (if there is one), and inform the parties of any **postmediation** actions. In sessions that do not result in settlement, the mediator will summarize any enhanced understanding or points of commonality for the parties or explain other options the disputants can take. Often the closure of a mediation that does not end in agreement starts a new topic of what the next steps are in moving forward from there.

Postmediation

After the session, several actions may be required. It is not typical for the mediator to have a role in enforcing or monitoring the agreement. However, the mediator may engage in the following activities:

- Conducting an evaluation survey of the mediator's skillfulness or disputant satisfaction
- Typing final agreements
- Filing case records if required by agencies or courts
- Destroying notes, if permitted by law
- Billing the disputants for services, as appropriate
- Processing the case with superiors or co-mediators

DOES CULTURE MATTER IN MEDIATION?

The approach to mediation described in this book is a European American model. Each culture brings its own assumptions to mediation. Most European Americans believe that a mediator should be an impartial and neutral stranger. They also expect that the other person in the conflict will be direct about what the problem is and that conversation should proceed in an orderly and rational way where one person speaks at a time. Other cultures may feel these behaviors are odd, rude, or improper. For example, some Native American tribes (as well as other cultures) would prefer a mediator known to both parties, who cares about each of them and understands their background and values. The use of intermediaries to negotiate conflicts has a long tradition in Hawaii, where an extended family member fulfills the mediator or *haku* role. In many cultures, neutrality is not as important as a familiar person who has a stake in making sure the family or community remains peaceful.

Although understanding culture and how it impacts mediation is an advanced topic, the pervasiveness of cultural issues justifies its introduction in this basic textbook. Culture theories are useful to expand the mediator's understanding of how the disputants might approach conflict and conversations about conflict. The important word is *might*. While research about general cultural trends and specific cultural examples are helpful, the mediator must avoid stereotyping and assuming that all people from a cultural group share exactly the same values and perceptions.

Culture theories describe some of the ways groups approach conflict. For example, Hammer (2002, 2005) argues cultural groups differ in their preferences on how to express emotion during conflict and how directly to speak about issues (**directness**). Most European Americans and Northern Europeans prefer direct speech and restrained expression of emotion (**discussant cultural conflict style**). Eastern Europeans and some African Americans exhibit direct speech and more passionate expression of emotions (**engagement cultural conflict style**). Many Southeastern Asian and Native American groups learn to be more indirect in discussing issues (to maintain social harmony) and to be restrained in emotional expression (**accommodation cultural conflict style**). Arab culture suggests exuberant expression of emotion is appropriate while using more indirect communication about issues (**dynamic cultural conflict style**).

Mediators can learn several lessons from the study of Hammer's (2002, 2005) cultural typology: (1) Some disputants believe starting a conversation with a direct expression of the conflict is rude or embarrassing. More premediation work or general background conversation may be needed before getting into the heart of the issue with those who prefer indirect expression of issues. With disputants at the extreme ends of the direct vs. indirect continuum, **shuttle mediation** may be the most efficient method as the mediator can adapt to each disputant's cultural style. (2) When one disputant is from a high emotionally expressive culture and the other is from a low emotionally expressive culture, the mismatch may make everyone uncomfortable (including the mediator). The high expression of emotion may be frightening to those unfamiliar with cultures that are louder, are more exuberant, and use bigger gestures. Conversely, the low expression of emotion may be perceived as a lack of involvement or caring by those who prefer more energetic conversations. The mediator must parse what behaviors mean in their cultural contexts. Is a loud disputant trying to intimidate the other party or just from a highly expressive culture? Some African Americans prefer a more emotionally expressive style of communication. If a mediator works with two African American disputants who share a very expressive style, should the mediator follow the narrow strictures of the European American model or allow a more energetic exchange (see Davidheiser, 2008)? A study of culture raises many questions about how a mediator chooses to control the flow of a session.

Geert Hofstede's dimensions provide a starting point for a general study of culture. Using his website (www.geert-hofstede.com), a mediator could compare the general cultural characteristics of two cultures along five dimensions: power distance, individualistic/collectivist culture, masculinity/femininity, long- vs. short-term orientation, and uncertainty avoidance.

Power distance indicates a group's comfort with social stratification and authority. Disputants from high power distance cultures may have distinct expectations that lower status individuals should defer to those in higher status, creating an inequitable condition in a mediation session. Likewise, high power distance individuals will expect more direction from a high status mediator.

The **individualism/collectivism dimension** describes a cultural group's preference for a group identity or individual identity. Highly collective cultures may accept settlements that do not seem to be in their personal best interest if issues are framed in terms of a larger social good.

The **masculinity/femininity dimension** indicates a group's preference for competition for material rewards or social cooperation. The dimension is named based on social stereotypes that masculinity is associated with competition and femininity is associated with cooperation.

Uncertainty avoidance identifies cultures that tolerate ambiguity and those that are uncomfortable with change or uncertain social situations. Individuals who are uncertainty averse would require very specific terms in any agreement, with contingency clauses to cover options that might arise.

Short- vs. long-term thinking divides cultures into those that value resolving immediate issues and those who consider the immediate issue to be just one part of social relationships that extend back in time and into the future. Syuker and Bagshaw (2013) argued that the use of a Western model of court-annexed mediation with a focus on short-term outcomes led to its lack of success in Indonesia where long-term group harmony is a cultural value. Navajo Nation members who are accustomed to a well-known spiritual or community member acting as a mediator who restores peace in the long term (Pinto, 2000) might feel uncomfortable with the European American mediation model using a mediator who is focused on one specific and immediate issue.

Mediators should be aware of their own personal cultural expectations and preferences in addition to those of their disputants. For example, Inman, Kishi, Wilkenfeld, Gelfand, and Salmon (2013) warn that international mediation across cultures may put **in-groups** with **out-groups**, causing **stereotypes** and ethnocentrism to flourish. These effects also can arise in small-scale mediation sessions that cross cultural divides. Cultural traits can impact the choices a mediator makes during the process. Brigg (2003) explains how the Western mediator's goal is to create a place for rational individual expression that moves toward interpersonal peace—a perspective that could perplex disputants from other cultures. Although this book presents a European American approach to mediation, understanding and being open to modifying the model to embrace cultural dynamics is important. Skilled mediators are adept at recognizing and mitigating their personal cultural assumptions as well as at recognizing when the disputants may be operating from differing cultural worldviews. As you learn the model of mediation presented in this text, challenge yourself to find areas where cultural expectations could affect parties' interpretations of the process.

SUMMARY

The theoretical assumptions a mediator holds affect how a mediation proceeds. Transformative mediators focus on changing some essential element of the disputants' relationship or communication and creating understanding between parties. Facilitative mediators focus on negotiation and problem solving around specific issues and deal with emotions if they present barriers to settlement or if the primary issues are around the relationship. Evaluative mediators disclose their professional assessment and opinions of a case to the disputants.

Determining why we mediate helps mediators make informed choices about the techniques and models they will use. An integrated model of mediation called the balanced mediation model incorporates a facilitative and problem-solving approach. Unlike lockstep models that offer no room for adapting to fit the specific situation, the phases in the balanced mediation model are more flexible. This model is a teaching tool to master the key skills of mediation. The basic mediation model includes premediation, mediation, and postmediation. During the session, a mediator will proceed through an opening statement, storytelling and issue identification, establishing an agenda, negotiation and problem solving, agreement testing and writing, and closure.

Culture can impact how the disputants perceive each other or the mediator, and vice versa. Mediators should acquire basic culture theory knowledge and information about specific cultural groups in their service area. The next chapter presents some basic skills deemed essential for entry-level mediators.

CHAPTER RESOURCES

Discussion Questions

1. Is a transformative, evaluative, or facilitative approach better for Reymundo and Noah in Case 2.1? If relationship and substantive issues exist in the same case, which should be worked on first?
2. Reflect on variables that affect a case. What might happen in the Reymundo and Noah mediation if the mediator made any of the following choices:
   A. Allowing uninterrupted talk from each party
   B. Holding a private meeting with each party
   C. Focusing mostly on the emotions of the parties or mostly on the special project
   D. Not allowing parties to speak to one another during the mediation
   E. Not writing a formal agreement
   F. Having the agreement kept private between the parties or sharing the agreement with their supervisor
3. Consider the benefits and drawbacks if the mediator conducted or did not conduct premediation activities in the two cases in this chapter.
4. How does an online mediation environment affect the choices a mediator may make in structuring a mediation? What would be fundamentally different in the online context as opposed to a face-to-face mediation? Are there some types of mediation that would be inappropriate in an online environment?
5. What cultures are evident in your location? How might these cultures' views of how to conduct conflict be different from your personal views?

PORTFOLIO ASSIGNMENTS

Portfolio Assignment 2.1: Personal Reflections on Mediation Philosophy

Which philosophy of mediation (facilitative, transformative, or evaluative) aligns with your natural approach to helping others? How will this tendency toward one philosophy be beneficial to you as you employ a balanced mediation model? How might it be detrimental in your efforts toward a balanced approach?

Portfolio Assignment 2.2: Personal Reflections on Culture

What assumptions does your root culture hold about the ideal way to resolve conflict? What challenges might you face when disputants do not share your assumptions?

3 ESSENTIAL SKILLS FOR MEDIATORS

"What makes a good mediator?" is a question often posed by students pursuing mediation training. Mediators juggle many roles simultaneously in the course of their work. First and foremost, though, mediators are good communicators. That said, the mediator balances many responsibilities throughout the course of a mediation.

Facilitating the process ensures that the focus of the discussion stays on target and that the disputants move toward productive outcomes. Mediators listen to the disputants' stories, provide a safe environment for them to vent their frustrations, validate each person's worth or feelings, and then move the parties toward negotiation. Mediators are conduits of information. They encourage disputants to share information and to understand each other's perspective while also keeping communication focused on important and relevant issues. They help disputants discover and express their interests and goals. Mediators are links to additional expertise, data, or resources that may be required to settle a dispute. They know the services available in their community and assist the parties to determine whether outside, objective data are required. Mediators are boundary keepers when they frame issues, moderate emotions, and contain the conflict within a productive range.

Mediators are adept at keeping an eye on the process, emotions, content, individuals, flow of information, power issues, verbal and nonverbal messages, and much more. It seems like a lot of tasks to accomplish during a short period of time. Acquiring the fundamental tools that enable mediators to succeed is the first step in mastery of the art and practice of mediation. While the array of mediator skills may seem daunting, training and skill practice can build confidence and competence.

AN OVERVIEW OF MEDIATOR SKILLS

To some extent, the skills of entry-level and advanced mediation are the same, with the primary difference being the depth of accomplishment in each skill area. In other ways,